

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JULY 1997 SESSION

**FILED**

July 29, 1997

Cecil Crowson, Jr.  
Appellate Court Clerk

LARRY J. CAWTHON, )  
 )  
Appellant, )  
 )  
VS. )  
 )  
STATE OF TENNESSEE, )  
 )  
Appellee. )

C.C.A. No. 02C01-9702-CR-00064

SHELBY COUNTY

HON. JOSEPH B. BROWN, JR.,  
JUDGE

(Post-Conviction)

FOR THE APPELLANT:

FOR THE APPELLEE:

**WILLIAM C. GOSNELL**  
217 Exchange Avenue  
Memphis, TN 38105

**JOHN KNOX WALKUP**  
Attorney General and Reporter

**DEBORAH A. TULLIS**  
Assistant Attorney General  
450 James Robertson Parkway  
Nashville, TN 37243-0493

**WILLIAM L. GIBBONS**  
District Attorney General

**JOHN CAMPBELL**  
Assistant District Attorney General  
201 Poplar Avenue, Suite 301  
Memphis, TN 38103

OPINION FILED: \_\_\_\_\_

**AFFIRMED - RULE 20 ORDER**

**JOE G. RILEY,**  
**JUDGE**

## ORDER

This is an appeal from the denial of post-conviction relief. Convicted of criminal attempt to commit rape and sentenced to twelve (12) years as a Range III, Persistent Offender, petitioner alleges he was deprived of effective assistance of counsel at his trial. He further contends the indictment is void. We AFFIRM pursuant to Rule 20 of the Tennessee Court of Criminal Appeals.

Firstly, we note that petitioner does not make appropriate references to the record in support of his argument as required by Tenn. R. App. P. 27(a)(7). The issues are, therefore, waived. Rule 10(b), Tennessee Court of Criminal Appeals. We will, nevertheless, address the issues.

As to petitioner's allegations of ineffective assistance of counsel, the trial court found that trial counsel conducted adequate discovery, conducted an appropriate investigation, properly discussed the case with petitioner and adequately cross-examined the victim regarding her identification of the defendant. The trial court concluded that petitioner indeed received effective assistance of counsel at his trial. The record supports this finding.

Petitioner also attacks counsel's failure to request a special jury instruction on eyewitness identification. State v. Dyle, 899 S.W.2d 607, 613-14 (Tenn.1995), promulgated a new jury instruction on eyewitness identification; however, petitioner's case was tried and affirmed on appeal prior to the filing of the Dyle opinion. Counsel was not ineffective for failing to request a special jury instruction on eyewitness identification.

As to the sufficiency of the indictment, petitioner contends his trial counsel was ineffective for failing to attack the indictment by pre-trial motion. This issue was waived by the failure to present it to the post-conviction court. Tenn. R. App. P. 36(a). Furthermore, petitioner's allegation that the indictment is fatally deficient due to the failure to allege the requisite *mens rea* is without merit. See State v. Phillip Ray Griffis, C.C.A. No. 01C01-9506-CC-00201 (Tenn. Crim. App. filed April 30, 1997, at Nashville); State v. David L. McClure, C.C.A. No. 01C01-9505-CR-00145 (Tenn. Crim.

App. filed April 30, 1997, at Nashville); Turner v. Harrison, C.C.A. No. 02C01-9701-CC-00025 (Tenn. Crim. App. filed April 17, 1997, at Jackson).

After a thorough review of the records, briefs, and the law governing the issues presented for review, it is the opinion of this court that the judgment of the trial court should be affirmed pursuant to Rule 20, Tennessee Court of Criminal Appeals.

---

JOE G. RILEY, JUDGE

CONCUR:

---

JOE B. JONES, PRESIDING JUDGE

---

DAVID H. WELLES, JUDGE